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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 520

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Railroad Company, respectfully petitions for a writ of certiorari to review a final judgment and decision of the Supreme Court of Missouri, the highest court of that state, affirming a judgment for

$40,000 in favor of the above administratrix and against petitioner, entered in the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404. The style of the case in the Supreme Court of Missouri is "Ocie Hampton, Administratrix of the Estate of John Leo Hampton, deceased, vs. Wabash Railroad Company," 204 S. W. 2d 708 (not yet officially reported). Said judgment and decision of the Supreme Court of Missouri became final October 13, 1947, and petitioner has exhausted its remedies in the courts of Missouri.

I.

Summary and Short Statement of Matters Involved.

John Leo Hampton, the deceased, section foreman of petitioner, and nine members of the crew under his supervision and control, were killed by a train of petitioner, while they were working on petitioner's track in a cut and on a curve, with a compressor and eight air hammers in noisy operation. Petitioner's track supervisor, who was deceased's superior, had made an inspection in this cut a day or two before. In view of the noise surrounding the operation of the compressor and air hammers, this supervisor, in order to protect deceased and his men, had given deceased a positive and specific order "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." There was no watchman on the bank, and the deceased was operating the compressor which motivated the air hammers, in violation of this order. Under the "primary duty rule" as announced by this Court, there can be no recovery under the Federal Employers' Liability Act for the death of an employee who violates a positive order given for his protec-

tion and which order, if obeyed, would have avoided the accident, even though others may have been negligent. There was no watchman on the bank. Therefore, under the order, the compressor should not have been in operation, the deceased could not have been working on the track using the air hammers, and the accident could not have happened.

This action is for the death of John Leo Hampton, which occurred August 4, 1942, shortly after 1:00 p. m., on petitioner's main-line track between Kansas City and St. Louis, about two and one-half miles west of Truesdale, Missouri, between Pendleton and Warrenton (Tr. 36, 3, 81). The deceased was the foreman of petitioner's section gang of seventeen men which was engaged in raising, ballasting, lining up and straightening said track (Tr. 3, 36, 37, 189, 195, 196). At the time of the accident and for some fifteen minutes prior thereto, the deceased and nine men in his gang were working on the track in a deep cut and on a curve (Tr. 17), with a compressor and eight air hammers in noisy operation. While so engaged, all ten who were working with the hammers were struck and killed by a daily, first-class, scheduled Wabash passenger train, running east under orders which permitted it to run at its usual running speed of 75 miles per hour (Tr. 25, 64, 65, 67, 195, 204).

The bank of the cut in which deceased was working was about twenty-five feet high (Tr. 143). The cut was 1,250 to 1,300 feet long (Tr. 17, 18). The curve began 300 feet west of the west end of the cut, and deceased and the other men at the hammers were working about 975 feet east of the west end of the cut. The compressor, the purpose of which was to furnish power through pipes to operate the air hammers, was in operation about 234 feet west of the hammers and on the north side of the track

(Tr. 18, 37). Approaching from the west, the curve was to the left, or north (Tr. 27).

A day or two before the accident, and while deceased and his section gang were working in the same cut, the deceased, under the undisputed evidence, received a positive and specific order from his superior, the track supervisor, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 196). The deceased violated this order, for the compressor was in operation, operating the hammers, at the time of the accident, and there was no watchman on the bank (Tr. 55, 67, 105).

Except for the few minutes during which time the accident occurred, deceased had always had a watchman on the bank while the men were working on the track in that cut (Tr. 54, 67). Deceased, who was in charge of the men and designated their work, without stopping the compressor had ordered the man who had been on the bank watching to do other work which required him to be down near the track for a short time (Tr. 23, 26, 45). At the time of the accident, this man was standing just west of the compressor, where he could not hear (Tr. 29, 38, 39, 48), and where he could see only about ten feet down the track (Tr. 39), and there was no watchman on the bank.

The deceased was twenty-nine years of age at the time of the accident (Tr. 8). He had been engaged in track work for about fifteen years (Tr. 88) and had been foreman of an extra gang during the season for three years or more (Tr. 57). He was the foreman in full charge of this crew (Tr. 56, 57, 159, 160, 188). It was his duty to obtain the lineup of trains for the day before he began work (Tr. 189, 190), and to have a copy of the current timetable with him while on duty (Tr. 202, 220). If a first-class train was late, it was his duty to learn when it would come along and only work his men during that interval at a place

where they were safe (Tr. 202, 203, 190, 191), and to keep the track in condition for that train (Tr. 204). It was his duty to instruct the watchman as to his duties (Tr. 192, 198), and to select the crew member to act as watchman and to see that the watchman was at his post (Tr. 54, 55, 204, 218, 107, 198). He knew that the passenger train involved here had not passed and was running late (Tr. 56, 59, 68, 107, 108, 218). He intended to move the compressor after this passenger train had passed, and to do so it was necessary to place it on the track and push it by hand to the new location (Tr. 46, 26), and to protect this movement he had sent a man in each direction to stop all trains after the train here involved had passed, until the compressor could be moved (Tr. 33, 37, 64, 66, 69, 208, 160, 166, 109). It was his duty to regulate the speed of trains through this cut (Tr. 197, 114, 115, 214, 215, 218), and on the morning of the day of the accident, he had caused a "slow" order to be issued which required all trains except first-class passenger trains to slow to twenty-five miles per hour approaching the place of the accident, and had put out a "slow" board a mile west of the point of the accident, on the engineer's side of the track, to slow down trains at this point to twenty-five miles per hour, except those trains that were excepted in the "slow" order (Tr. 130, 131). It was the undisputed evidence that the speed of the train involved was not restricted by the "slow" order or the "slow" board, and the deceased knew that the train could be expected to come through at its usual speed. It was also deceased's duty to have the track in condition for the train to come through at its usual speed, and protect himself and his men (Tr. 122, 123, 204, 140, 194, 195, 196, 118, 119, 120, 127, 130, 132, 136).

The train involved in the accident was a regular, scheduled, first-class, daily passenger train, traveling at a speed of seventy-five miles per hour (Tr. 31). It was

due at the point of the accident shortly before 1:00 o'clock p. m., and was a few minutes late. The train whistled approaching the curve east of Pendleton, about two miles from the place of the accident; it whistled again for a road crossing, about a mile and a quarter east of Pendleton, and then again approaching the curve where the accident occurred (Tr. 136). In each instance the regular road-crossing whistle was given. The road-crossing whistle consists of two blasts a second apart, a lapse of a second or two, then one short blast, then the lapse of a second, and then a long blast (Tr. 136). The final blast of the last whistle before the accident ended just as the train was going into the curve mentioned above (Tr. 136). These whistles were heard by all witnesses who were in a position to hear, but were not heard by the man at the compressor or the men at the hammers, or by the members of the gang working 200 feet east of the hammers, because of the noise of the hammers and the compressor (Tr. 66, 67).

There was no contention made by respondent that the whistles were not given as above set out. The case was submitted to the jury on evidence that the whistles were not sounded all the way around the curve in accordance with custom.

Under the above facts, the matters involved are: first, the application of the "primary duty rule" as announced by this Court; second, the negligence of the deceased as a matter of law; third, whether or not respondent's recovery is based on speculation and conjecture that deceased would have heard the train if it had whistled all the way around the curve; and fourth the conflict between instructions, which confused the contributory negligence of the deceased with his negligence as the sole cause of the accident, as will be more specifically pointed out in the brief.

II.

Statement As to Jurisdiction.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stats. 937, U. S. C. A. Title 28, Secs. 344(a), 344(b) and 350, to review a judgment of the Supreme Court of Missouri rendered in the case of Ocie Hampton, administratrix of the estate of John Leo Hampton, deceased, respondent, vs. Wabash Railroad Company, appellant, No. 40021, 204 S. W. 2d 708 (not yet officially reported), affirming a judgment in favor of respondent and against petitioner in the sum of $40,000 rendered by the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939, Title 45, U. S. C. A., Sec. 51, *et seq.*, 53 Stats. 1404.

The judgment of the Supreme Court of Missouri denies petitioner's rights which it claimed and to which it was entitled under the Federal Employers' Liability Act.

The Supreme Court of Missouri is the highest court of Missouri in which a decision could be had (Constitution of Missouri, 1945, Art. V, Sec. 2). "The Supreme Court shall be the highest court in the state." Art. V, Sec. 7 of said Constitution provides that the Supreme Court may sit *en banc* or in divisions.

On September 8, 1947, Division One of the Supreme Court of Missouri, to which the case had been previously assigned (Tr. 236), filed its opinion and affirmed the judgment of the Circuit Court of Jackson County, Missouri (Tr. 236).

On September 20, 1947, and within fifteen days after the affirmance of said judgment, petitioner (appellant), as provided by the rules of the Supreme Court of Missouri, filed in said Division One its motion for rehearing or to

transfer the cause to the Supreme Court of Missouri *en banc* (Tr. 246), which motion was overruled on October 13, 1947 (Tr. 252), on which date the judgment became final and petitioner had exhausted its remedies in that court.

The above motion was duly filed, pursuant to the Constitution of Missouri, Art. V, Sec. 9, which provides that a division may transfer a cause to the court *en banc*, and rules 1.19 and 2.02 of the Supreme Court of Missouri then in effect, which provide that motions for rehearing and to transfer to the court *en banc* must be filed within fifteen days after the opinion has been filed, and that the two motions may be joined and a rehearing or to transfer may be prayed in the alternative (Appendix to this petition, p. 13).

III.

Questions Presented.

Under the evidence and the decisions of this Court, did the Supreme Court of Missouri deny petitioner its rights under the Federal Employers' Liability Act:

1. In refusing to determine that petitioner was entitled to a directed verdict in its favor under the "primary duty rule," because deceased, an experienced foreman, working in a deep cut on a curve, operating eight air hammers and a compressor which interfered with his ability to hear trains, without the protection of a watchman on the bank, violated a positive and specific order from his superior "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles," which violation resulted in his death. If he had obeyed the order, the compressor and air hammers would not have been in operation and the accident would not have occurred.

Under the "primary duty rule" deceased's negligence was the sole cause of his death.

2. In refusing to determine that petitioner's instruction No. 7 (Tr. 226), which required the jury to find deceased negligent as a matter of law, should have been given.

3. In refusing to determine that petitioner was entitled to a directed verdict in its favor because the evidence left respondent's right to recover to speculation and conjecture.

4. In refusing to determine that respondent's instructions numbered 3 (Tr. 224) and 12 (Tr. 230) were in direct conflict with petitioner's instruction No. 9 (Tr. 228), and confuse contributory negligence and sole cause.

IV.

Reasons Relied On for the Issuance of the Writ.

1. The opinion of the Supreme Court of Missouri in the application of the "primary duty rule" is in conflict with the following decisions of this Court:

Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743.

and with the following decisions of the United States Circuit Courts of Appeal:

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239, (Cert. den. 280 U. S. 565).

Willis v. *Penn. R. Co.*, 122 F. 2d 248 (Cert. den. 314 U. S. 684).

Southern Railway Co. v. *Hylton*, 37 F. 2d 843 (Cert. den. 281 U. S. 745).

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979 (Cert. den. 299 U. S. 595).

Chicago, St. Paul, M. & O. R. Co. v. *Arnold*, 160 F. 2d 1002 (8th Cir.).

2. The dictum of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, l. c. 63, 87 L. Ed. 610, l. c. 615, has caused confusion in the application of the "primary duty rule," where in discussing assumption of risk under the Federal Employers' Liability Act, the Court said:

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule,' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley Ry. Co.* v. *Caldine*, 378 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22 * * *."

We submit that the "primary duty rule" involves neither contributory negligence nor assumption of risk. Under that rule, the negligence of the deceased or injured person is so complete in itself that it is deemed in law to be the sole cause of the accident.

3. Deceased was guilty of negligence (at least contributory, if not primary) as a matter of law, when under the undisputed evidence he violated a positive order which would have protected him; and the opinion of the Supreme Court of Missouri in upholding the action of the trial court in refusing petitioner's instruction No. 7 (Tr. 226, 227), which declared deceased guilty as a matter of law, denied petitioner's right to have the jury reduce the damages. (Respondent sued for $40,000, and the verdict was for $40,000.)

4. It is a matter of speculation and conjecture whether the deceased, working in a cut and on a curve with eight air hammers in operation, would have heard the train if the whistle had continued around the curve. He did not hear the whistles that were given, although all the wit-

nesses not in the vicinity of the compressor and air hammers, did hear them. The noise of the hammers and the compressor even prevented members of the gang working 200 feet east of the hammers from hearing the whistles that were given.

5. The court (Tr. 224) gave respondent's instruction No. 3, which permitted the jury to diminish the damages in the event they found that deceased was guilty of negligence which contributed to his death. Petitioner's Instruction No. 9 (Tr. 228), which told the jury that deceased could not recover if the jury believed his negligence was the sole cause of the accident, was given by the court. After Instruction No. 9 was given, respondent requested Instruction No. 12 (Tr. 230), which was given by the court. Instruction No. 12 referred to Instruction No. 9, and confused contributory negligence of deceased with his negligence as the sole cause of the accident.

PRAYER.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, to the end that the judgment of that court in the cause above mentioned may be reviewed and that upon such review, the decision of that court be reversed, and for such further relief as to this Honorable Court may seem proper.

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APPENDIX.

Rules of the Supreme Court of Missouri.

Rule 1.19—"Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

"The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere re-argument of issues determined by the opinion will be disregarded.

"If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time."

Rule 2.02—"Transfer to the Court en Banc. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court *en Banc* must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court *en Banc* may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative."

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in Ocie Hampton, Administratrix of the estate of John Leo Hampton v. Wabash Railroad Company (Tr. 237), is reported in 204 S. W. 2d 708 (not yet officially reported).

II.

Statement of Jurisdiction.

The judgment of the Supreme Court of Missouri, the highest court of that state, determined rights claimed by petitioner under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A. 51; 53 Statutes 1404), adversely to petitioner. Jurisdiction of the court is urged under Section 237 of the Judicial Code, as amended by an Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 937; U. S. C. A., Title 28, Secs. 344(a), 344(b), and 350.

A more complete statement as to jurisdiction and the nature of the case is made under Point II of the Petition for Writ of Certiorari, and will not be repeated here.

III.

Statement of the Case.

The statement in Point I of the Petition for Writ of Certiorari is adopted here for the sake of brevity.

IV.

Specification of Errors.

The Supreme Court of Missouri erred in the following particulars:

1. In refusing to determine that petitioner was entitled to a directed verdict in its favor at the close of the evidence, where the evidence established that deceased, in operating the compressor without a watchman on the bank, violated a positive and specific order given to him by his superior "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." This order was given for de-

ceased's protection, and if obeyed the accident could not have happened.

2. In refusing to determine that petitioner's instruction No. 7 (Tr. 226, 227) which required the jury to find deceased negligent as a matter of law, should have been given by the trial court.

3. In refusing to determine that petitioner was entitled to a directed verdict in its favor because under the evidence the verdict against petitioner was necessarily based on speculation and conjecture.

4. In refusing to determine that instructions No. 3 (Tr. 224) and No. 12 (Tr. 230) requested by respondent and given by the trial court, were in direct conflict with instruction No. 9 (Tr. 228) requested by petitioner and given by the trial court, and confuse contributory negligence and sole cause.

Summary of the Argument.

I.

In operating the compressor without a watchman on the bank, deceased violated a positive order which, if obeyed, would have avoided the accident. Under the "primary duty rule" as announced by this court, the violation of the order became the sole cause of the accident, and this is true even though others may have been negligent.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239 (cert. den. 280 U. S. 565).

Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743.

Willis v. *Penn. R. Co.*, 122 F. 2d 248 (cert. den. 314 U. S. 684).

Southern Railway Co. v. *Hylton*, 37 F. 2d 843 (cert. den. 281 U. S. 745).

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979 (cert. den. 299 U. S. 595).

Chicago, St. Paul, M. & O. R. Co. v. *Arnold*, 160 F. 2d 1002, 1006.

II.

The dictum in *Tiller* v. *Atlantic Coast R. Co.*, 318 U. S. 54, 63, 87 L. Ed. 610, 615, to the effect that under the Federal Employers' Liability Act, contributory negligence through violation of a company rule, became assumption of risk, is misleading and confusing, is in conflict with the decisions under Point I above, and if taken literally destroys the "primary duty rule."

III.

Deceased was guilty of negligence which petitioner claims was the sole cause of the accident. Deceased was at least guilty of contributory negligence as a matter of law, and the court's failure to so instruct the jury deprived petitioner of its right to have the jury reduce the damages as provided by the Federal Employers' Liability Act.

(Authorities under Point I above.)

IV.

The verdict was based on speculation and conjecture. The negligence on which the case was submitted was failure to blow the whistle all the way around the curve (Tr. 222). Within two miles of the place of the accident

the crossing whistle (two long, a short and a long blast) was sounded three times. These whistles were heard by all of the witnesses in a position to hear, but because of the noise of the compressor and the air hammers were not heard by the man at the compressor, the ten men working with the air hammers or the men working two hundred feet from the hammers. Who can say without speculation that the whistle would have been heard in time if sounded around the curve?

V.

Instructions No. 3 (Tr. 224) and No. 12 (Tr. 230) requested by respondent are in conflict with instruction No. 9 (Tr. 228) requested by petitioner. Instruction No. 12 was given by the trial court, after petitioner's instruction No. 9 was given, and confuses sole cause with contributory negligence. Instruction No. 12, by referring to instruction No. 9 which submitted the negligence of deceased as the sole cause of his death, permitted the jury to find against petitioner even though deceased's negligence was the sole cause of his death.

ARGUMENT.

I.

The Supreme Court of Missouri in Failing to Apply the "Primary Duty Rule" Deprived Petitioner of Its Rights under the Federal Employers' Liability Act and under the Controlling Decisions of This Court.

At the time of the accident, John Hampton, the deceased, was the foreman in charge of a section gang that was working in a cut and on a curve on defendant's track, with a compressor and eight air hammers in noisy operation. He was working right at the hammers (Tr. 26, 64, 68). The evidence is clear and undisputed that the deceased had a specific, unqualified, and mandatory order from his superior, track supervisor McLaughlin, that he must not operate the compressor unless he had a watchman on the bank where he could see approximately two miles (Tr. 195, 196); that he violated this order is clear, as all the evidence shows that he was operating the compressor without a watchman on the bank (Tr. 55, 105).

He knew by his own order that the man who had been watching was working down in the cut (Tr. 23, 25, 26, 44), and knew that no one was on the bank to watch. The man who had been watching was at the time of the accident standing west of the compressor where he could not hear and where he could see only ten feet (Tr. 39, 58), at the time fast eastbound train No. 2 suddenly appeared a short distance away. Deceased knew No. 2 was a scheduled train (Tr. 202, 220), and that it had not passed, and that it was late and could be expected at any moment. He knew that it would come through at its usual speed because he had given the slow order which had excepted No.

2 (Tr. 196, 197, 115), and had sent a man west to flag all trains after No. 2 (Tr. 160). There was nothing to extenuate his conduct or confuse his judgment, and his duty was as clear as its performance was easy. He knew the danger and was in entire control of the means to prevent it.

Under the law, a violation of a positive duty or instruction by an employee, without which violation he would not have been killed, bars recovery for his death, even though other employees may have been negligent. The instruction of McLaughlin was positive; that it was given is undisputed, as is also the fact that it was violated, and if it had not been violated, the compressor would not have been operating without a watchman on the bank, deceased and his men could not have been working with the air hammers, and the accident would not have occurred.

In a well established line of decisions, this Court, in construing the Federal Employers' Liability Act, has consistently held that where an employee violates a positive order issued to him for his own safety, and is injured as a result thereof, his negligence is so directly responsible for his injury that it is deemed in law to constitute the sole cause of his injury, even though other employees may have been negligent. In other words, that his violation is so sufficient in itself that he cannot escape the responsibility for the consequences of his own wrong by showing that some other employee could have done more.

To bring this rule of law sharply to the court's attention, we first refer to *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224, and *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 2d 239, (cert. den.) 280 U. S. 565, 74 L. Ed. 618. Caldine and Dibble were respectively the conductor and engineer or motorman on a suburban passenger car. They were the only members of the crew. They each had a copy of a train order which provided that they should wait at

a certain station until another train had passed. They both violated the order and proceeded past the station. In the ensuing collision, the conductor, Caldine, was killed, and the engineer, Dibble, was injured. Suit was brought for Caldine's death based on Dibble's negligence, and Dibble brought suit for his injury based on Caldine's negligence. Recovery was denied in the Caldine Case, even though the engineer, Dibble, was negligent, and in the Dibble Case, even though the conductor, Caldine, was negligent. The holding in each case was that the violation of the positive order barred recovery and that neither could recover on the negligence of the other.

In *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131, plaintiff's intestate, a locomotive engineer, was killed when he proceeded across a railroad crossing without positively ascertaining, by sending another member of the crew to look, that the way was clear. Such a duty was imposed on the engineer by state law. In the ensuing collision, the engineer was killed. Plaintiff offered evidence to the effect that the fireman could have looked and warned the deceased engineer of the approaching train, and contended that the deceased engineer's negligence was merely contributory and would not bar a recovery. In refuting this theory and holding the deceased engineer's negligence to be the sole cause of the accident, this Court said, at page 3 (L. Ed., p. 132) of its opinion:

> "* * * Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, Chap. 149, Sec. 3, 35 Stat. at L. 65, 66, Comp. Stat., Sec. 8659, 8 Fed. Stat. Ann. (2d Ed.), p. 1339) to hold that he could recover for an injury primarily due to his failure to act as required,

on the ground that possibly the injury might have been prevented if his subordinate had done more. See *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444, 448, 60 L. Ed. 732, 36 Sup. Ct. Rep. 406. * * *"

In *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, plaintiff's intestate, an engineer of a passenger train, had an order not to pass a certain station unless he or some member of the crew knew that a train from the opposite direction had passed. The train was crowded and the deceased engineer proceeded past the station without ascertaining the location of the oncoming train. A collision occurred and the plaintiff's intestate was killed. The Supreme Court of Tennessee affirmed a judgment of the trial court allowing recovery, on the theory that the other members of the crew were also negligent. This court reversed the judgment, and at page 148 (L. Ed., p. 216) of its opinion, said:

"The trial was in a court of the State of Tennessee, and the plaintiff got a judgment, which was sustained by the supreme court of the state on the ground that the other members of the crew, as well as the engineer, were bound to look out for the approaching train, and that their negligence contributed as a proximate cause to the engineer's death. We are of opinion that this was error. It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 3, 68 L. Ed. 131, 132, 44 Sup. Ct. Rep. 1."

In *Willis* v. *Penn. R. Co.*, 122 F. 2d 248 (cert. den. 314 U. S. 684), three yard employees were ordered to repair

a switch in a gravity classification yard. The custom was for one of the crew to watch for trains while the other two repaired the switch. On the day in question, plaintiff's intestate had the duty to act as lookout and see that the other two men were protected as they bent over and worked on the rails with a hammer and chisel. While the two men were working on the rails, a switching crew kicked a freight car into the switch. Plaintiff's intestate not only failed to warn the two men working, but failed to see the car coming into the switch and was, himself, killed. The actionable negligence claimed by plaintiff was the practice of kicking cars pursuant to the custom that some member of the repair gang should stand watch.

In holding that the negligence of the deceased was the sole cause of his death, the United States Circuit Court of Appeals, at page 249 of its opinion, said:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his own death. In such circumstances, his executrix can have no recovery under the Act. *Great Northern Ry.* v. *Wiles,* 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; *Davis* v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Ry. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; *Blunt* v. *Pennsylvania R. Co.,* 6 Cir., 9 F. 2d 395; *Unadilla Valley Ry. Co.* v. *Dibble,* 2 Cir., 31 F. 2d 239. The recent amendment, 45 U. S. C. A., Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

In *Southern Ry. Co.* v. *Hylton,* 37 F. 2d 843 (6th Cir.) (Cert. den. 281 U. S. 745), Hylton, an engineer had received a warning order to look out for a steel gang, which under the uncontradicted testimony meant to keep his

train under control so that he could stop it in half the distance he was able to see ahead. Hylton violated the order, which violation resulted in a derailment in which he was killed. In holding such negligence the sole cause of his death the court in its opinion said:

> "At Clinton, a few miles west, Hylton had stopped for orders. 'Train Order 19' seems to be the general term for special warnings and cautions to trainmen. At Clinton, written upon the blank for order 19, Hylton received a copy of the train dispatcher's order, dated at Knoxville on that day, and reading: 'To all trains at Clinton. Look out for steel gang laying rails today between 14 and 15 C mile posts, from 7 A. M. until 4 P. M.' The uncontradicted testimony from witnesses on both sides is that this order made it Hylton's imperative duty to hold his train during this mile under such control that he could at any time stop within half the distance of his clear vision ahead. * * *
>
> "* * * He not only did not keep his train under control, within the distance directed, but, after once coming to a dead stop, and after again having maintained for a period perfect control, he deliberately released it. If he had obeyed the 19 order, there would have been no derailment.
>
> * * * * * * *
>
> "In this situation we think it clear that Hylton's general disobedience of the 19 order and his specific and voluntary release of control because he had misjudged the distance of the danger constituted the sole efficient cause of the disaster, and the absence of any further second flag cannot be treated as a substantially contributing cause. The recent decisions of the Supreme Court require this conclusion.
>
> * * * * * * *
>
> "In *Frese* v. *Chicago, etc., R. Co.*, 263 U. S. 1, 44 S. Ct. 1, 2, 68 L. Ed. 131, there was a collision at a grade crossing of two railroads. One of the engi-

neers was killed, and this action against his employer resulted. His contributory negligence was not involved. It was his duty under the rules (and it was no different duty because it was also required by statute) to bring his train to a full stop and ascertain that the way was clear before proceeding. He brought his train to a stop, and proceeded, and was in collision. The other train was approaching from the fireman's side, and it was plainly the fireman's duty to keep watch for such approach and give notice to the engineer. The fireman had neglected this duty. Without the neglect, the collision would not have occurred. The court denied any recovery on behalf of the engineer, and said: 'Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (45 U. S. C. A., Sec. 53) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.' The only suggested distinctions between that case and this are as between a statute and a train dispatcher's express order, and as between a subordinate and an employee in another department. We see no substance in these distinctions."

The conclusion from these cases is that where an employee fails to perform a positive duty and is injured, even though another may have been negligent, he cannot recover, and it is immaterial whether that duty is imposed by rule, order, instructions, state law or custom. The negligence of one does not contribute to the negligence of the other, because of the positive duty of the person injured.

In the case at bar deceased was guilty of wanton and gross negligence; he ordered the man who had been on

the bank watching to do other work which kept him off the bank, and knowing that there was no watchman on the bank and that No. 2 might come through any minute, operated the compressor in violation of the positive order not to do so, without a watchman on the bank.

Deceased's negligence in violating the order was the proximate cause of his own death and the death of nine of his crew. His negligence was so direct and so complete that under the foregoing decisions, the Missouri Court should have held it was the sole cause of his death, as a matter of law.

The Supreme Court of Missouri in its opinion refers to the case of *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743, as being an authority against petitioner's contention. The Missouri Court misconstrues the Rocco case. In that case there was a general rule of the railroad which forbade track walkers to occupy the main line track without first ascertaining from the operator the whereabouts of approaching trains. Rocco, a track walker, went on the main line on a track inspection tricycle without getting the line-up of trains and was killed in a collision with a passenger train. The negligence charged was that the train was operated at excessive speed and failed to give warning of its approach, also that Rocco was not furnished a safe place to work. The contention of the railroad was that Rocco's violation of the rule was the primary cause of the accident, relying on the Unadilla Valley and other cases cited in this brief. This Court recognized the "primary duty rule" laid down in those cases, but held that the Rocco Case didn't come within that rule because the rule did not forbid him going on the track after he found out about the location of the trains. In so holding the Court said on page 279 (p. 746, L. Ed.):

> "These decisions are not controlling in the present case. There is no suggestion that the rule upon which the respondent relies forbade Rocco to start on his inspection trip if he ascertained that the approaching train was within seven or eight miles of Ithaca. It was his duty to make his afternoon trip. The rule required no more than that before leaving he should acquaint himself with the whereabouts of trains on the branch and guide himself accordingly. If he had made inquiry, whether he should await the arrival of the train, or attempt to meet it at some point a short distance from that city, was a matter for his decision. If the rule had *forbidden* him to leave under circumstances such as inquiry by him would have disclosed, this case would be parallel with those cited."

If Rocco had been forbidden to go on the track under circumstances which inquiry would have disclosed, the rule would have been like the order in the case at bar, where deceased, with no evidence for need for haste, was forbidden to operate the compressor unless he had a watchman on the bank and the accident could not have happened.

The Supreme Court of Missouri in its opinion correctly quotes from the opinion of this Court in regard to the duty resting on the deceased in *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131, and then infers that the case goes off on the ground that there was no other negligence than that of the deceased, Frese. This Court does say that the other negligence claimed was too speculative, but the decision in the case was based on the failure of Frese to perform the positive duty imposed upon him by statute, regardless of whether or not there was a practice for the fireman to look, and regardless of what the fireman could have done if he had looked. While the opinion of this Court does not set out what practice was referred to, by turning to the *Frese Case* in the Missouri reports, 290 Mo. 501, 235 S. W. 97, it will be seen that the practice referred

to was the practice of the fireman to look out for engines on his side of the train when crossing another track, so the decision of this Court is that the engineer's violation of the statute bars recovery for his death, regardless of whether or not the fireman was negligent.

We have the utmost respect for the Supreme Court of Missouri, but it entirely missed this point in the case. In its opinion it quotes the order correctly: "* * * not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." The Court then turns the order around and speculates that the accident might have happened even if there had been a watchman on the bank. *That is not the point.* The evidence is undisputed that there was no watchman on the bank and that deceased *was* operating the compressor. It was the operation of the compressor without a watchman on the bank that violated the order, and not the failure to have a watchman on the bank. So, why speculate as to what might have happened if there had been a watchman on the bank? It can only be conjectured that the accident might or might not have occurred. But it is certain that if deceased had not operated the compressor, which he was forbidden to do without a man on the bank, the compressor and hammers would have been silent, the deceased and his men would not have been on the track, and the accident could not have happened. That is the test laid down in the Unadilla, Frese, and other cases cited by us, namely, would compliance with the order have avoided the accident, regardless of what anyone else did.

In the Supreme Court of Missouri respondent took the position that the order which deceased violated was established only by the parol testimony of McLaughlin (Tr. 196) and Lee (Tr. 210, 211) and, therefore, the jury had the right to disregard it. The Missouri court did

not decide the case on that point. This Court, however, has expressly passed on that question. In *Chesapeake & O. R. Co.* v. *Martin*, 283 U. S. 209, 75 L. Ed. 983, l. c. 987:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from *no reasonable point of view is it open to doubt.* The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, *there was no cross-examination.* Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only *possible* ground for submitting the question to the jury as one of fact was that the *witness was an employee of the petitioner.* In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held" (Italics ours). Citing and quoting *Hauss* v. *Lake Erie & W. R. Co.*, 105 Fed. 733, and *M. H. Thomas & Co.* v. *Hawthorne*, 245 S. W. 972 (Tex.).

And the United States Circuit Court of Appeals, in the recent case of *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248 (Cert. Den. 314 U. S. 684), at page 250 of its opinion, said:

> "* * * The appellant urges that the jury was free to discredit the testimony that Willis was to act as watchman for the repair gang and that its verdict shows that such testimony was disbelieved. The testimony is analyzed in detail in Judge Byers' opinion, reported in 35 F. Supp. 941. We agree with his con-

> clusion that it was trustworthy. The jury could draw no inferences from the demeanor of the witnesses since their testimony was given by deposition, and we can see nothing in it which would justify the jury in finding that Willis was not to act as lookout for approaching cars. A verdict based on such a finding should not be permitted to stand. *Chesapeake & O. Ry. Co.* v. *Martin,* 283 U. S. 209, 216, 51 S. Ct. 453, 75 L. Ed. 983; Wigmore, Evidence, 3d Ed., Sec. 2495; *Pennsylvania Ry. Co.* v. *Chamberlain,* 288 U. S. 333, 340, 53 S. Ct. 391, 77 L. Ed. 819."

See also *Pennsylvania Ry. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819.

It is clear from these controlling authorities that, a jury will not be permitted to disbelieve or ignore uncontradicted testimony under the guise of passing on its credibility, unless there exists some reasonable and substantial *basis* for doubt.

The depositions of McLaughlin and Lee which were introduced in evidence and in which the order to have a watchman on the bank appeared, were taken by respondent on October 27, 1944 (Tr. 176, 204). The trial began March 18, 1946 (Tr. 7). In the sixteen months which elapsed between the taking of the depositions and the trial no attempt was made by respondent to contradict that evidence. In fact, the evidence of respondent's witness George Hampton corroborates McLaughlin and Lee that the order was given. George Hampton testified that deceased had always had a watchman on the bank in that cut when the hammers were running (Tr. 54, 67). While it is difficult to recognize the George Hampton who gave the second deposition (Tr. 15) as the same man who gave the first deposition (Tr. 35), there was nothing in the second deposition which contradicted his testimony that deceased had always had a watchman on the bank when the hammers were running.

The opinion of the Missouri Court in failing to apply the "primary duty rule" has failed to follow the decision of this Court and has deprived petitioner of its rights under the Federal Employers' Liability Act.

II.

The Dictum of This Court in Tiller v. Atlantic Coast Line, 318 U. S. 54, 63, 87 L. Ed. 610, in a Case Not Involving the "Primary Duty Rule," to the Effect That under the Federal Employers' Liability Act, Contributory Negligence Through Violation of a Company Rule Became Assumption of Risk, Is Misleading and Confusing and If Taken Literally, Destroys the "Primary Duty Rule."

The following statement of this Court in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54, at page 63, 87 L. Ed. 610, at page 615, has caused confusion in the application of the "primary duty rule" when, in discussing assumption of risk under the Federal Employers' Liability Act:

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley R. Co.* v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis* v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. * * *"

The very foundation of the "primary duty rule" is that it does not involve contributory negligence or assumption of risk. The rule is that, where an employee has a positive duty to perform and fails to perform it, resulting in his injury, he cannot recover, even though other employees may have had the same duty, which they failed to perform. It is his negligence which bars his recovery. The negligence of others has nothing to do with the matter.

Their negligence is not contributory, nor is there any question of assumption of risk. His negligence is the "sole cause" of his injury.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239 (cert. den. 280 U. S. 565).

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Frese v. *C., B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979, 981 (cert. den. 299 U. S. 595).

Willis v. *Penn. R. Co.*, 122 F. 2d 248, 249 (cert. den. 314 U. S. 684).

The above dictum in the Tiller Case is confusing to the public, the bench, and the bar, and is not supported by the decisions of this Court given as authority for the statement.

We submit that the Court should take this case, clarify the Court's statement in the Tiller Case, and settle the conflict which exists in the decisions of the courts in the application of the "primary duty rule."

III.

Deceased Was Guilty of Negligence As a Matter of Law, and the Opinion of the Supreme Court of Missouri in Refusing to Hold That Petitioner's Instruction No. 7 Should Have Been Given Deprived Petitioner of Its Rights under the Federal Employers' Liability Act.

Petitioner's printed rules (2005, 2006) placed on the foreman the responsibility for personal injury to himself and his men (Tr. 122). These rules applied to extra and floating gang foremen such as John Hampton (Rules 1097, 1098, 1099) (Tr. 123).

Rule 1097 provided: "Extra and Floating Gang Foremen, in charge of trackmen, report to and receive instructions from the Track Supervisor" (Tr. 123).

John Hampton received from his track supervisor, Ray McLaughlin, an order, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 195, 196).

At the time this accident occurred the compressor was in operation and there was no watchman on the bank. The man who had been watching on the bank had been ordered by deceased to other work down in the cut. This man was standing just west of the compressor, where he could not hear (Tr. 37, 38, 39) and where he could see only about ten feet down the track (Tr. 39).

In the light of this evidence showing a clear violation of the order under which John Hampton was required to carry on his work, defendant requested instruction No. 7 (Tr. 226), which would have advised the jury that the violation of this rule constituted negligence as a matter of law. The ruling refusing this instruction forced petitioner to assume the burden (Defendant's Inst. No. 9, Tr. 228) of convincing the jury that the non-observance of this order constituted negligence, when petitioner was entitled to an instruction that the failure of deceased to obey the order constittued negligence as a matter of law. This ruling refusing requested instruction No. 7 placed an unnecessary and illegal burden on petitioner and was prejudicial to its rights under the Federal Employers' Liability Act. If the instruction had been given the jury would at least have been required to reduce its verdict.

IV.

The Evidence Left It to Conjecture and Speculation As to Whether Sounding the Whistle Around the Curve Would Have Prevented the Accident.

Petitioner contends there was no substantial evidence in this case that the sounding of a whistle around this curve would have prevented this accident.

Eight of the men in this crew were on the track, bent over operating eight air hammers (Tr. 52). These men were working in a group very close together so that the combined noise and din of the eight air hammers practically, if not completely, eliminated any possibility of any of these eight hearing a whistle far enough away to enable them to get to a place of safety (Tr. 67, 111, 215, 216). Certainly it would be the purest speculation on this evidence to conclude that one of these eight men operating these chattering air hammers might have heard a whistle had it been sounded around the curve, in time to have enabled deceased to get to a place of safety.

The compressor was also going at the time (Tr. 33, 37, 38). It made so much noise that a train whistle could not be heard by one near it (Tr. 37, 38). As George Hampton deceased's uncle was admitteedly standing just west of the compressor at the time, having previously approached the compressor and adjusted the valve, it is obvious that for a period of time he could not have heard a train whistle around the curve had it been sounded (Tr. 37, 38). He was in no position to watch out for anyone except himself (Tr. 58).

Aside from George Hampton, the only other witness for respondent who was at the scene of the accident at the time it occurred was Harold Richardson, whose deposition was taken and read by respondent. This witness was engaged in doing some shoveling about 200 feet east of the place where the hammers were working (Tr. 62, 66).

He had just been up in the bushes in a ditch south of the track answering a call of nature (Tr. 63). He testified that he heard no whistle; but he did not testify that he was giving any attention to listening for a train at the time. While he was off the track on the south bank, he was in no danger and while in the ditch and shrubbery was in a poor position to hear anything. He had the right to assume, and undoubtedly did assume, that the men 200 feet west in earlier danger from that direction were maintaining a lookout in that direction. Furthermore at the place he was there was considerable noise from the hammers and compressor (Tr. 66, 67).

Ollie Wright, another member of this extra gang and a witness for petitioner, was working with respondent's witness, Harold Richardson, at the same place about 200 feet east of the hammers (Tr. 109, 110). He testified that at that point he could hear the noises of both the hammers and the compressor (Tr. 110, 111). He testified that he heard no whistle but said he "just couldn't hear because of that air pressure making so much noise" (Tr. 111). He testified he "couldn't hear the train at all" at that point (Tr. 112). This same interference necessarily affected the ability of Richardson to hear a train whistle.

Andrew Morton, another member of this crew, who was working about 200 feet east of the hammers, testified as a witness for petitioner that when the hammers were running, they made so much noise he could not even hear the compressor (Tr. 103). When the hammers were running he could hardly ever hear a train whistle (Tr. 106).

Comer Sheely testified that at the direction of the deceased, he went west to flag the trains after No. 2 went by (Tr. 160, 166). He had gone a quarter to a half mile west of the hammers when the train passed him (Tr. 160). He testified that when the hammers were

going, a train whistle could be heard only part of the time (Tr. 162). He did not say how close the train had to be for the whistle to be heard.

C. V. Lee testified that with the hammers running, the operators of the hammers could not hear the train whistle even at a distance of two or three hundred feet (Tr. 215, 216).

Track supervisor, McLaughlin, said in his experience, the men operating the hammers could "usually" hear a train whistle as much as a quarter of a mile away (Tr. 200). His statement was in general terms. He expressed no opinion as to the men's ability to hear in this deep curving cut with brush and shrubbery on the banks.

Deceased's father, Leo Hampton, an old experienced foreman, testified for the plaintiff on direct examination as follows (Tr. 80):

> "Q. While the men were working on the track using their hammers and the foreman with them tell us whether or not the noise of the whistle, the warning whistle, can or cannot be heard by the foreman or the men when the hammers are running?
>
> A. They can be heard.
>
> Q. Have you had that experience over many years?
>
> A. Yes, sir."

This witness did not attempt to say how near the train had to be for the whistle to be heard under such circumstances, nor did he attempt to say a whistle could be heard by the men while working in a deep cut in a curve with the banks covered with bushes and shrubbery. We submit his testimony amounts to no more than that sometimes, when the train is close enough and conditions are right, it is possible to hear the train whistle over the noise of the hammers.

We have discussed the strongest evidence in this record from respondent's viewpoint, and submit it is not

substantial but leaves the matter to speculation and conjecture as to whether under conditions there existing a train whistling all the way around the curve would have been heard in time to enable deceased to get off the track to a place of safety before this fast train reached that point.

Mr. Lee testified that he had been sent east to flag by deceased (Tr. 208). That he had reached a point about three-fourths mile east of the point where the accident occurred at the time of the accident (Tr. 206). He heard the train whistle (Tr. 211). Comer Sheely heard the train whistle after it passed him and when it was about half way between the crossing and the cut (Tr. 162). The engineer, Boque, testified that he started blowing the last crossing whistle approximately a quarter of a mile west of the west end of this curve and continued blowing it for nine seconds or for a distance of 972 feet (Tr. 136). The fireman, Lewis, testified that the engineer whistled until he reached the corner of the curve (Tr. 170). Thus every witness who was not in close proximity to the hammers and the compressor heard the whistle.

We submit the evidence in this case is insufficient to make a case for the jury as to the ability of the men at the hammers and compressor to have heard a whistle in time to have prevented the accident.

V.

Respondent's Given Instructions No. 3 (Tr. 224) **and No. 12** (Tr. 230) **Are in Direct Conflict with Petitioner's Given Instruction No. 9** (Tr. 228), **and Confuse Contributory Negligence and Sole Negligence.**

Respondent's instruction No. 3 deals with the issue of contributory negligence. Petitioner's instruction No. 9 deals with sole negligence of deceased. Respondent's in-

struction No. 12 (Tr. 230) given after petitioner's instruction No. 9, begins:

> "Instruction No. 9 submits to you the issue of sole cause. Now as to such issue of sole cause and such instruction, you are instructed that if you find from the evidence that John Hampton was negligent * * *."

Very clearly the negligence of John Hampton referred to is sole negligence as submitted under defendant's instruction No. 9. We do not believe it is possible that the jury could have understood instruction No. 3 to mean otherwise.

Such instruction No. 9 continues (Tr. 228):

> "and find from the evidence that the railroad was negligent as submitted to you in instruction No. 1, and find from the evidence that such negligence of the railroad, if so, and such negligence of John Hampton, directly concurred and combined in causing the death of John Hampton, then you will find the issue of sole cause in favor of the plaintiff."

"Such negligence of John Hampton," as used in the part of this instruction last quoted, also clearly refers to sole negligence. Obviously sole negligence cannot at the same time be concurring negligence. This instruction confuses sole negligence and concurring negligence. It tells the jury that if the sole negligence of John Hampton concurs with the negligence of petitioner as submitted in instruction No. 1, "then you will find the issue of sole cause in favor of the plaintiff." Sole cause and concurring negligence are utterly inconsistent and contradictory concepts. By this instruction petitioner is robbed of its sole cause submission which is not a defense at all. Petitioner's defense of sole cause was completely undermined and sabotaged by this instruction No. 12.

CONCLUSION.

We urge the Court to grant this writ for the reasons above set out and because of the confusion of the courts and the bar in respect to the "primary duty rule" and its application. Witness the opinion of the Missouri Court in this case, the dictum of this Court in the Tiller case, the dissenting opinion in *Chicago, St. Paul, M. & O. Co.* v. *Arnold,* 160 F. 2d 1002, and the opinion in *Van Derveer* v. *Delaware, L. & W. R. Co.,* 84 F. 2d 979 (Cert. denied 299 U. S. 595).

The Missouri Court by its judgment has deprived the petitioner of its rights under the Federal Employers' Liability Act.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 520.

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was brought under the Federal Employers' Liability Act to recover for the death of respondent's husband, foreman of an extra gang who was killed when Petitioner's fast eastbound passenger train No. 2 struck and killed ten of the extra gang on a curve in a cut known as "Dead Man's Cut," approximately sixty three miles west of St. Louis, Missouri. The train crew concededly violated

long standing rule and custom requiring the engine to sound warning whistles in going into and through cuts in curves for the protection of men working on the track (Tr. 239). From a verdict for respondent in the trial court in the sum of Forty Thousand Dollars ($40,000), Petitioner prosecuted an appeal to the Supreme Court of Missouri. The judgment was there affirmed and became final. Petitioner now seeks to have this court review the opinion of the Supreme Court of Missouri.

Theory of Parties in Trial Court.

Plaintiff tried and submitted the case on the admitted failure of train No. 2 to sound warning whistles going into and around the curve in the cut for the protection of men working on the track, in violation of rule and long standing practice and custom (Tr. 222-223).

Petitioner's theory was that deceased had been given an oral instruction not to operate an air compressor activating air hammers unless he had a watchman on the bank above the cut, and that he did not have a watchman posted at the time of the casualty, and that such failure constituted the sole cause of the casualty, even though the train crew were conceded to have failed to sound warning signals as required by rule and custom for protection of such workmen, and such rule was relied upon by such workmen.

Issues Raised in Missouri Supreme Court.

Petitioner asserted as grounds of reversal in the Missouri Supreme Court the following:

1. The evidence was insufficient to show that the sounding of warning whistles would have been effective to warn deceased and avert the casualty.

2. Deceased's violation of the alleged verbal order not to operate the compressors without a watchman on the bank was the sole proximate cause of his death (violation of primary duty).

3. Deceased's claimed violation of the alleged order requiring a watchman constituted contributory negligence as a matter of law and the court erred in not so instructing the jury (Inst. 7, Tr. 226-227).

4. Respondent's given Instruction No. 3 on contributory negligence and plaintiff's explanatory instruction on sole cause conflicted with defendant's Instruction No. 9 on sole cause and were confusing and misleading (Tr. 224-225, 228-230).

Opinion of Missouri Supreme Court.

In overruling the contentions raised by petitioner, the Missouri Supreme Court made the following holdings:

1. "Viewing the evidence in its light most favorable to plaintiff, we find that there was substantial evidence to show that a whistle could have been heard by the men working at the hammers, had the whistle been sounded" (Tr. 239).

2. "There was substantial evidence showing defendant was negligent in failing to warn and that such negligence was the proximate cause in whole or in part of her husband's death" (Tr. 239).

3. "In the instant case, assuming the deceased was instructed not to operate the compressor unless he had a watchman on the bank, we do not believe his violation of such instruction was in and of itself the sole and only cause of the casualty. * * * It appears to us that the giving of this instruction to deceased did not thereby relieve the defendant of its duty to warn by whistle as prescribed by its

rules and by custom and practice, a duty which it owed whether a watchman was stationed on top of the bank or not" (Tr. 242-243).

4. "Its (trial court) refusal to instruct the jury that decedent was guilty of negligence as a matter of law was also proper" (Tr. 243).

5. "The instructions do not conflict, they distinguish the issues, and are not confusing" (Tr. 244).

ISSUES ON CERTIORARI.

As reasons relied on for the issuance of a Writ of Certiorari by this Court, Petitioner makes substantially the same claims made in the Missouri Supreme Court.

STATEMENT OF FACTS.

Respondent believes that the facts in this case clearly demonstrate the correctness of the rulings of the Missouri Court. Although respondent deems petitioner's statement to be confusing, incomplete in some respects, and as tending to treat as undisputed matters brought out only in oral testimony on defense, she refers this court to the statement of the case made in the opinion of the Missouri Supreme Court and adopts that statement (Tr. 237 *et seq.*).

SUMMARY OF THE ARGUMENT.

I.

In holding that there was substantial evidence that a whistle would have been effective to prevent the casualty if one had been sounded as required by rule and custom, and that such failure to warn was a proximate cause of the casualty, the holding of the Supreme Court of Missouri is in harmony with controlling federal decisions.

Tennant v. *Peoria and Pekin Union Ry. Co.*, 321 U. S. 29, 88 Law Ed. 520.

Lavender v. *Kurn*, 327 U. S. 645, 90 Law Ed. 916.

Ellis v. *Union Pac. R. Co.*, ... U. S. ....., 91 Law Ed. 433.

Preston v. *Union Pac. R. Co.*, 292 Mo. 442, 239 S. W. 1080, Cert. Den. 260 U. S. 753, 43 Sup. Ct. 14.

Kidd v. *Chicago, R. I. & P. Ry. Co.*, 310 Mo. 1, 274 S. W. 1079, Cert. Den. 269 U. S. 582, 46 Sup. Ct. 119.

II.

The Supreme Court of Missouri correctly held that petitioner's evidence that deceased had been given a verbal order to have a watchman on the bank, which order he had allegedly violated, did not defeat a recovery in spite of evidence that petitioner's violation of rule and custom to warn would have been effective to avoid the casualty, because:

(a) The jury was not required to accept as true petitioner's verbal testimony (incapable of direct contradiction) that deceased was ordered not to operate the hammers without a watchman on the bank, and this court is not bound by such testimony.

Sartor v. *Arkansas Natural Gas Co.*, 321 U. S. 620, 88 Law Ed. 967.

C. & O. Ry. Co. v. *Martin*, 283 U. S. 209, 51 Sup. Ct. 453.

(b) Such violation of the alleged order, if true, could only constitute assumption of risk, which has been abolished as a defense.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610.

(c) Evidence supported finding that failure to warn was a direct proximate cause of death.

Spokane & I. E. R. Co. v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, l. c. 688-689.

Rocco v. *Lehigh Valley R. R.*, 288 U. S. 275, 53 Sup. Ct. 343.

McCarthy v. *Penna. R. Co.*, (C. C. A. 7) 156 Fed. 2d 877.

Brock v. *Mobile & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, Cert. Den. 287 U. S. 638, 53 Sup. Ct. 87.

III.

The Missouri Supreme Court properly sustained the trial court in refusing to give petitioner's instruction No. 7 because it was not supported by the evidence, was abstract, took jury issues from the jury, failed to explain the effect of contributory negligence and ignored proximate cause.

Authorities under Point II above.

IV.

Respondent's instructions three and twelve were correct legally and involve no substantial federal question.

Seaboard Airline Ry. Co. v. *Duvall*, 225 U. S. 477, 32 Sup. Ct. 790.

ARGUMENT.

The opinion of the Supreme Court of Missouri so clearly sets out the facts in this case and so accurately applies the law to these facts that any argument in support of the correctness of this opinion hardly seems necessary. If anything else were needed to demonstrate the correctness of that opinion, we believe it would only be necessary to cite one case, that of *Brock* v. *M. & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, where the facts are almost identical with those in the present case. This court placed the stamp of approval on that opinion by denying a writ of certiorari, 287 U. S. 638, 53 Sup. Ct. 87. However, for such additional argument as this Court may desire to consider, we set out the following:

POINT I.

In holding that there was substantial evidence to show that a whistle could have been heard by the men working at the hammers had the whistle been sounded and that the failure to whistle was a proximate cause of Hampton's death, the Supreme Court of Missouri is in harmony with controlling federal decisions.

In holding that the plaintiff sustained the burden of proof necessary for recovery under the Federal Employers' Liability Act, the Supreme Court of Missouri found from the record that, "there was substantial evidence showing defendant was negligent in failing to warn" (Tr. 239). Petitioner does not claim that there was insufficient evidence of a rule and of long established custom and practice of sounding the whistle when entering and all the way around curves in cuts for the protection of men working

there. Neither does petitioner contend that there was insufficient evidence of a violation of such rule and custom. Petitioner could hardly so contend in view of the positive testimony of both petitioner and respondent that such rule and custom existed and were violated.

Petitioner contends, however, that there was no substantial evidence in this case that the sounding of a whistle when going into and around this curve would have prevented this accident. The Supreme Court of Missouri, after reviewing the record, said, "We find there was substantial evidence to show that a whistle could have been heard by the men working at the hammers, had the whistle been sounded" (Tr. 239). Petitioner has cited no controlling Federal decisions with which this holding of the Missouri Supreme Court conflicts.

In so contending, petitioner ignored and now ignores the proof and the positive testimony of its own witness, Ray McLaughlin, who had been in charge of track maintenance and maintenance employees for petitioner in the district between St. Louis and Columbia, Missouri, since 1924. He was thoroughly familiar with track work and had been around men operating air hammers many times in the course of his duties for the defendant (Tr. 176-178). We quote McLaughlin's testimony on this point:

"Q. Now, of course, you have been around gangs working when they operated air hammers, have you not?

A. Yes, sir.

Q. And it is usually possible to hear the train whistles over and above the hammers?

A. Yes, sir, I have heard that whistle.

Q. Well, can you usually hear trains whistle over and above the noise of the air hammers?

A. Yes, I would say that you could.

Q. When the train was how close?

A. Approximately a mile.

Q. What?

A. Part of a mile away.

Q. In other words, if eight air hammers had been operating and a train whistled a quarter of a mile away, it has been your experience that the men operating the hammers could hear that whistle?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And train No. 2 was required to whistle approaching and entering this curve, was it not?

A. Yes, sir.

Q. Then, why was it necessary to have a watchman out if the men could hear the whistle?

A. *To give that much more protection"* (Italics ours) (Tr. 200-201).

In view of McLaughlin's positive testimony that a whistle was the principal means of protection and could have been heard, and in view of his position and experience with petitioner, we submit that his evidence on this point is conclusive.

Leo Hampton, who had worked for the Wabash on the extra gang, and as section foreman for forty-three years, testified that based on his experience men working with air hammers in cuts on curves like the one in question could hear warning whistles when the hammers were running, and that men *relied on hearing the whistle* (Tr. 70-71, 80).

It was not necessary for deceased or the men using the hammers to have heard the whistle in order to have prevented the catastrophe.

After George Hampton had uncoupled the pipe and talked to deceased he was relieved of all duties but looking

and listening for trains. He went west along the middle of the track for the express purpose of looking and listening for a train whistle. He testified that after he got west of the hammers and at or near the compressor he could have heard a train whistle a mile, or a mile and a half away (Tr. 27, 32). Had he heard such a whistle, he could have immediately turned off a valve on the south side of the compressor and stopped the hammers and called the men's attention to the train (Tr. 28). The hammers made a chattering noise which did not carry a long distance like a train whistle (Tr. 31). On previous occasions he had always heard trains when they whistled while the hammers were operating (Tr. 48-49). The noise created by tamping rock under the ties does not spread out a long distance, while the sound of a whistle carries for a great distance (Tr. 80).

Under this evidence, the question was one of fact for the jury and it is not the function of the Appellate Court to reweigh the evidence.

Tennant v. *Peoria and Pekin Union Ry. Co.*, 321 U. S. 29, l. c. 34, 36, 88 Law Ed. 520, l. c. 524-525.

Lavender v. *Kurn*, 327 U. S. 645, l. c. 652-653, 90 Law Ed. 916, l. c. 922-23.

Ellis v. *U. P. R. Co.*, 91 Law Ed. 433.

Preston v. *U. P. R. Co.*, 292 Mo. 442, 239 S. W. 1080, l. c. 1082, Certiorari Denied 260 U. S. 753, 43 Sup. Ct. 14, 67 Law Ed. 496.

Kidd v. *Chicago, R. I. & P. Ry. Co.*, 310 Mo. 1, 274 S. W. 1079, Certiorari Denied 269 U. S. 582, 46 Sup. Ct. 119, 70 Law Ed. 424.

POINT II.

The opinion of the Supreme Court of Missouri is not in conflict with controlling decisions of this court in holding that the alleged violation of verbal order did not defeat respondent's right of recovery.

(a) The jury was not required to accept as true relator's testimony that such an order was given and the reviewing court cannot accept it as true.

We direct the attention of the Court to the fact that the alleged order given Hampton not to operate the compressor unless he had a watchman on the bank was a verbal order. The only evidence as to this alleged order *came from petitioner's testimony.* The jury was not bound by this testimony, and, in passing upon the sufficiency of the evidence, this testimony must be ignored by the reviewing Court.

In *Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620, l. c. 627-628, 88 Law Ed. 967, l. c. 973, this Court said:

> "The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any and if any, what weight is to be given to the testimony.' *Spring Co.* v. *Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487, 490. 'The jury, even if such testimony be uncontradicted, may exercise their independent judgment.' *The Conqueror*, 166 U. S. 110, 131, 41 L. Ed. 937, 946, 17 S. Ct. 510. 'The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408, 43 L. Ed. 492, 495, 19 S. Ct. 233."

The only exception to this rule is set out in *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 51 Sup. Ct. 453, cited by petitioner, where no question of the credibility of

the witness was raised, he was not impeached or contradicted, his testimony was positive and direct, and, if not true, was easily capable of contradiction. This exception does not apply in the present case and the credibility of witnesses McLaughlin and Lee was for the jury.

Any other rule would work a grave injustice in a case like the present one where defendant relies on a verbal order claimed to have been *given to a man now deceased and unable to deny that such an order was given and in the exact terms claimed.* Defendant's evidence did not show that there were any witnesses to the alleged conversation other than Lee, who would be in a position to know whether the order was actually given or accurately stated in the testimony. It was impossible of contradiction by direct testimony by any living witness.

The weight of testimony of petitioner's witnesses McLaughlin and Lee was for the jury, and cannot be said to be unimpeached, or beyond doubt or question. We point out the following inconsistencies:

(1) The testimony is undisputed that John Hampton was an experienced, reliable and trusted employee of the railroad and if a positive order had been given in the terms claimed which fixed his duty, it is not reasonable to believe that he would have failed to obey it.

(2) Petitioner proved by its Superintendent McLaughlin that he considered a watchman only an additional means of protection (Tr. 248, 250). This tends to disprove or cast doubt on the alleged claim that he gave the direct and positive order he testified to.

(3) McLaughlin was present in court when the plaintiff's case was closed, yet defendant did not place him on the witness stand but read his deposition (Tr. 176-177). It must be inferred that defendant preferred reading his

deposition to putting him on the witness stand so that the jury might see him personally and pass upon his credibility and so that he could be cross-examined in the court room.

(4) His testimony as to the orders he gave Hampton was contradictory. We find the following:

"Q. Well, was Hampton instructed to have any certain kind of signals?

A. He was instructed to have a watchman out at all times while the machine was in operation and as to what signal or setup he used, his duty was to make that arrangement himself.

Q. In other words, Hampton was not instructed as to how to protect the men other than he was told to have a watchman at all times.

A. Yes, sir.

Q. Did you give these instructions yourself?

A. Yes, sir.

Q. Were they verbal instructions or written?

A. Yes, sir, verbal" (Tr. 275).

However, he later testified as follows:

"Q. Now, did Hampton at any time receive any instructions other than what you have already stated he received?

A. Well, he received instructions what work to do at this location, how much he was to raise the track.

Q. I mean with reference to protecting the men against trains.

A. The instructions which Mr. Hampton were given was to protect the track where he was working with a slow order for all except first-class trains, and to have the track in safe condition for first-class trains, and not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 195-196).

The testimony of McLaughlin is so contradictory as to make the weight of his testimony and his credibility an issue for the jury. At one time he positively testified that Hampton's only instructions were to have a watchman at all times, while he later testified that he was instructed not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles. Also a watchman was only an additional means of protection and Hampton had to work out his own way of getting warning from such watchman. The credibility of the testimony as to Hampton's duty in regard to the watchman is further impeached by his further testimony as follows:

> "Q. Now, as I understand it, Mr. McLaughlin, it was not Hampton's duty to look out for trains, was it? A. It was his *sole duty to handle the track* so it would be safe for the passage of trains, first-class trains, at full speed and it wasn't necessary to have it for the second-class trains, because they had an order to reduce to 25 miles an hour" (Tr. 202).

It is obvious that if it were true, as McLaughlin here states, that it was Hampton's *sole duty* to make the track safe for first-class trains, then he had no duty as to the men's safety.

(5) Further, McLaughlin and Lee both claim that McLaughlin told deceased to have a watchman *on the bank when the compressor was running*, yet both knew that George Hampton was the man appointed to watch, and *both knew that he was the compressor man and couldn't be on the bank and starting and stopping the compressor at the same time* (Tr. 188-189, 193, 198, 199, 216, 217).

Neither testified to McLaughlin protesting the choice of a watchman who *could not possibly* carry out the order they claim was given. This is irrefutable evidence that such an order was never given, or not in the terms they

claim because the watchman, in whose appointment McLaughlin acquiesced, could not be two places at once. To start or to stop the compressor, he had to be by or at the compressor.

(6) McLaughlin was track supervisor for the Wabash, the scene of the accident was in his territory. Hampton was under his supervision and the ten men who were killed were in his department, and he was responsible for their safety. His self-interest cannot be overlooked since he was so closely connected with the occurrence. There was also evidence that Lee was next in charge after McLaughlin and his self-interest was also greater than that of an ordinary employee.

(b) Violation of primary duty constitutes assumption of risk and is no defense.

Assuming (as did the Missouri Court) that the order was given and violated, such conduct on decedent's part would constitute assumption of risk. In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, l. c. 63, 87 L. Ed. 610, l. c. 615, this Court held that in the application of the "primary duty rule" contributory negligence "*becomes assumption of risk*" (Italics ours) which was abolished as a defense by the Amendment of 1939. Respondent could only be denied recovery if the evidence failed to show any negligence except that of deceased which proximately caused or contributed to cause the collision. The case does not involve the application of the "primary duty rule" but the rule of proximate cause.

(c) The evidence supported the finding that petitioner's failure to warn was a direct proximate cause of Hampton's death.

Notwithstanding the fact that the Missouri court found, "There was substantial evidence showing that defendant was negligent in failing to warn and that such

negligence was the proximate cause in whole or in part of her husband's death," Petitioner claims that the alleged violation of the alleged verbal order should defeat recovery.

Even if it could be assumed that plaintiff is bound by petitioner's evidence as to the verbal instruction claimed to have been given Hampton in regard to a watchman, this could not defeat or impair respondent's right to recovery. Petitioner admittedly had a duty to warn the men of the approach of the train by sounding warning whistles going into and around the curve. This duty is admittedly violated. The evidence was clearly sufficient for the jury to find that men relied on the whistle, could hear the whistle and that the whistle would have avoided the casualty. George Hampton was 250 feet west of the hammer and where he could hear the whistle for a mile (Tr. 27, 32). The duty of the train to warn by whistle was an independent duty owed by petitioner, regardless of whether a watchman was on top of the bank or down in the cut by the compressor. Petitioner's testimony clearly brought out that *warning whistles were the primary method of protecting men working on curves in the cuts,* especially this cut under the existing conditions. Defendant's witness McGlothlin positively testified as follows:

> "Q. Then, why was it necessary to have a watchman out if the men could hear the whistle?
> A. *To give that much more protection*" (Tr. 201).

Under the undisputed testimony the primary mandatory duty of protecting the men rested on the enginemen under written rules and long established custom, and their failure was a proximate cause of the casualty as ruled by the Missouri Supreme Court.

If the "primary duty rule" has any application in the present case, it applies to the enginemen and not to the

deceased. The primary means of protecting the men was the engine whistle, and a watchman was merely additional protection. Therefore, the primary duty of protecting the men working on the tracks rested on the engineer, and he violated this duty when he failed to obey the positive rule and custom, and his conduct in so doing should be held to be the sole proximate cause of the injury under the "primary duty rule."

The Supreme Court of Missouri points out that, "The mere placing of a watchman on the bank would not insure the safety of the men at work on the track. The watchman must first discover the approaching train in time to warn the men, then transmit the warning in time for them to reach a place of safety" (Tr. 242-243).

The testimony showed that when a man was up on the bank south of the tracks looking for trains he was 250 feet west of the men and on the bank south of the compressor and had no way of warning the men that there was an approaching train other than by waving, and if that did not attract their attention while they were working with hammers he would run down the bank to shut off the air and stop the hammers (Tr. 165, 166, 191, 192, 207). George Hampton, on several occasions, had started to and was running down the bank to shut off the air when they saw him. It had been necessary for him to start running down the bank to shut the air off that morning (Tr. 30-31). He was about twenty-five feet from the compressor before the men noticed him and got off the track for a freight train with a twenty-five mile slow order (Tr. 31, 50, 51, 165-166).

The Supreme Court of Missouri has so capably analyzed and distinguished the authorities cited by petitioner that we will not reanalyze them here (Tr. 240-244). It is sufficient to point out that in *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444, 36 Sup. Ct. 406; *Davis* v. *Kennedy*,

266 U. S. 147, 45 Sup. Ct. 33; *Unadilla Valley Ry.* v. *Caldine*, 278 U. S. 139, 49 Sup. Ct. 91; *Southern R. Co.* v. *Youngblood*, 286 U. S. 313, 52 Sup. Ct. 518; *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 2d 239, and *Frese* v. *Chicago, R. I. & P. R. Co.*, 236 U. S. 1, 44 Sup. Ct. 1, a collision between two trains was involved. In none was there any negligence on the part of the employees operating the train with which the collision took place. In each of the above cases the negligence charged was the failure of another employee on plaintiff's train to prevent the injured or deceased employee from violating a positive order. In each case, the court held that it was not negligence to fail to prevent a man from doing what he was forbidden to do and which he had positive orders to do. The situation in the present case would only be analogous if respondent sought to recover from the railroad for the failure of a subordinate to remind deceased to place a watchman on the bank.

Under all of the evidence in this case, if there was no watchman on the bank, the failure to see that George Hampton was not on the bank but down at the compressor could constitute nothing more than contributory negligence or assumption of risk, neither of which would defeat recovery, since such failure could be nothing more than a concurring proximate cause. *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, l. c. 688-689; *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 Sup. Ct. 343; *McCarthy* v. *Penna. R. Co.*, (C. C. A. 7) 156 Fed. 2d 877; *Brock* v. *Mobile & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, Cert. Den. 287 U. S. 638, 53 Sup. Ct. 87.

The Rocco case cited above has been thoroughly discussed in the opinion of the Missouri Supreme Court (Tr. 243). In that opinion, this Court clearly distinguished the situation in the cases cited by petitioner from a situation like that in the present case. Had a rule forbade Rocco from starting on an inspection trip when a train was within

seven or eight miles of Ithaca, the engineer of the train which struck him would have been guilty of no negligence because such a rule would have excused him from anticipating that Rocco might be on the track and taking steps to protect him.

In the present case, the duty to warn was absolute, and the primary means of protection, whether or not a watchman was or was not on the bank, particularly in view of the evidence that such a watchman might be ineffective to warn the men. So say the witnesses. In the Brock case, the situation was almost identical to that in the present case. Brock violated a rule prohibiting him from proceeding with a hand car unless a flagman was sent out when the view of the track was obstructed. He was killed when a train, in violating a custom to sound warning signals, struck the hand car. The Missouri Court held that Brock's negligence in failing to comply with the rule did not constitute sole cause, as his failure to send a flagman indicated he was relying on the custom of trains to sound warning signals. This court did not find such holding in conflict with controlling decisions as it denied a petition for writ of certiorari.

POINT III.

The court properly sustained the trial court in refusing to give petitioner's instruction No. Seven (Tr. 227) **because it did not follow the evidence, was abstract, took jury issues away from the jury, failed to explain the effect of contributory negligence and ignored the question of proximate cause.**

Relator's requested Instruction 7 was as follows:

"The Court instructs the jury that at the time and place mentioned in evidence, it was the duty of John Leo Hampton, the deceased, not to operate the compressor unless he had a watchman on the embankment

> where he could see the approach of trains in time to warn deceased, and that in failing to so station a watchman, the deceased was guilty of negligence as a matter of law.
>
> "You are further instructed that if you find from the evidence that said negligence of deceased in so failing to station a watchman on the embankment was the sole cause of his death, then your verdict must be for defendant" (Tr. 227).

It will be noted that this is not a contributory negligence instruction, but it submits to the jury whether the declared negligence could or could not be sole cause.

Petitioner, in contending that this instruction should have been given, cites a number of petitioner's printed rules. These rules are immaterial here because the instruction did not purport to invoke them.

There are numerous reasons why the Court did not act in excess of its discretionary powers in refusing this instruction. We call attention to the following:

(1) It does not follow the evidence. Petitioner apparently attempted to base this instruction upon the testimony of witness McLaughlin as to the oral instruction allegedly given deceased, but failed to adhere to such testimony.

It places upon decedent the absolute duty not to operate the compressor unless he had a watchman on the embankment *"where he could see the approach of trains in time to warn deceased * * *."* This does not conform to the instruction McLaughlin claims to have been given, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." Instead of placing upon decedent the duty McLaughlin claims was placed on him by his order, this instruction absolutely requires him to have a watchman who could see the approach of trains, "in time to warn deceased."

No one claims that deceased was given such an order, and under the evidence it would have been impossible to carry out such an order because it was conjectural as to whether a watchman on the bank could get down the bank and to the men, or to the compressor, in time to warn them. Deceased was not specifically instructed as to how the watchman would operate to prevent the train striking the men. In this respect, the testimony is as follows;

> "Q. In other words, Hampton was not instructed as to how to protect the men other than he was told to have a watchman at all times?
>
> A. Yes, sir.
>
> Q. But you did not instruct Hampton as to what kind of a signal he would receive from the watchman or what kind of a signal the watchman would tell him that a train was coming?
>
> A. No, sir, that was Hampton's duty to work that out for himself" (Tr. 192-193).

The instruction therefore did not follow the evidence and placed a greater duty on Hampton than McLaughlin claims he placed upon him, and placed an absolute legal duty upon him to have a watchman who could see trains "in time to warn deceased." It made the element "in time to warn" negligence as a matter of law when such element was not in the alleged verbal order. It will likewise be noted that the instruction does not require him to be warned in time to escape injury. A failure to have a watchman could hardly constitute negligence or a proximate cause of Hampton's death if the watchman's only duty was to warn him of trains, even though the warning came too late to avert catastrophe.

The instruction assumes that a watchman on the bank could have seen a train in time to warn deceased, which was an issue for the jury and could not be declared as a matter of law.

(2) The instruction requires the jury to take as true the testimony of McLaughlin. We have heretofore pointed out that McLaughlin's credibility was an issue for the jury. This instruction would have withdrawn that issue from the jury.

(3) Decedent's failure, if any, would have constituted assumption of risk and not negligence.

We have heretofore pointed out that under the authority of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610, a violation of the primary duty rule becomes assumption of risk and not contributory negligence.

(4) The instruction fails to explain the effect of decedent's negligence. The instruction declared that the deceased was guilty of negligence, yet failed to tell the jury what the effect of such negligence would be if they did not find that such negligence was the sole cause of Hampton's death as submitted in paragraph two of the instruction.

(5) The instruction required no finding of proximate cause. The instruction told the jury that decedent was guilty of negligence as a matter of law and that such negligence would completely defeat recovery if it constituted the sole cause of his death. It failed to explain that such negligence to constitute contributory rather than sole negligence must enter into and form a part of the efficient cause of the casualty. Had this instruction been given, it, taken in connection with plaintiff's Instruction 3, would have authorized the jury to diminish the verdict, even though such negligence did not in any wise contribute to Hampton's death.

POINT IV.

The Missouri Supreme Court properly held that it was not error to give respondent's instruction Number Three (Tr. 224) **and Number Twelve** (Tr. 230) **and no substantial federal question is involved herein.**

Respondent's Instruction No. 3 was in conventional form, and told the jury that if they found the plaintiff guilty of contributory negligence it would not bar recovery, but that the damages affixed must be diminished in proportion to the amount of negligence attributable to the plaintiff. Relator makes no claim that this instruction incorrectly states the law under the Federal Employers' Liability Act. Respondent's Instruction 12 explained that decedent's conduct as submitted in Instruction 9 could not constitute the sole cause of his death as submitted in that instruction, if they found that the railroad was negligent as submitted in Instruction 1, and such negligence directly concurred and combined in causing the death of John Hampton. This correctly stated the law and did not involve substantial rights under the Federal Employers' Liability Act. The assignment raises no substantial Federal issue. *Seaboard Airline Ry. Co.* v. *Duvall*, 225 U. S. 477, 32 Sup. Ct. 790, l. c. 793.

Wherefore, respondent respectfully submits that the decision of the Missouri Supreme Court is in conformity with controlling decisions of this Court under the Federal Employers' Liability Act, and that the petition should be summarily denied.

Respectfully submitted,

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